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CENTER FOR CLASS ACTION FAIRNESS, LLC

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MONDAY, APRIL 18, 2011

Babies "R" Us baby products antitrust class action settlement: McDonough v. Toys "R" Us

A class action against Babies "R" Us and manufacturers of upscale baby products—Baby Bjorns, Britax car seats, Kids Line and Peg Perego products, Maclaren strollers, Medela breast pumps—over allegedly anticompetitive vertical price restraints has resulted in a \$35.24 million settlement after the district court certified a class of consumers who purchased particular products from Toys "R" Us or Babies "R" Us since 1999 (and, occasionally, shorter time windows).

But the attorneys reserve themselves the right to ask for one third of that amount *plus* "expenses" *plus* fees for administering the settlement; the notice provides no upward bound for that amount, so for all we know class counsel (including Spector Roseman and Hagens Berman) will be asking for a majority of the fund. And notice and administration expenses come from the settlement fund, so the attorneys are seeking a commission on the notice. There is a *cy pres* provision entitling moneys to be used for third-party charities that the class counsel and defendants like; the notice provides no information who those third-party charities are. Because the class counsel is also seeking a third of those moneys, they have no incentive to ensure the money goes to their clients rather than to the charities that they themselves have selected. The settlement itself has a "clear sailing" agreement (§ 26) prohibiting the defendants from challenging the fee request, so unless there are objectors, the court will be faced with an *ex parte* request for this skimming of millions of dollars that should be going to the class. There's also a quickpay provision: the attorneys' fees are paid immediately, but there's no obligation for the settlement fund to ever disburse to the class members. But who has the incentive to hire an expensive attorney to object?

POSTED BY TED FRANK AT 8:48 AM 

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ABOUT ME



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Ted Frank is the founder of the three-lawyer Center for Class Action Fairness and an adjunct fellow at the Manhattan Institute. Mr. Frank was a resident fellow with the American Enterprise Institute from 2005 to 2009, a litigator from 1995 to 2005, and clerked for the Honorable Frank H. Easterbrook on the Seventh Circuit Court of Appeals. Mr. Frank, a 1994 graduate of the University of Chicago Law School with high honors, has testified before federal and state legislative subcommittees multiple times on class actions and

